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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

UNITED FOOD & COMMERCIAL
WORKERS LOCAL 99; et al.,

Plaintiffs,

vs.

JAN BREWER, in her capacity as Governor of
the State of Arizona; et. al.,

Defendants.

CASE NO. CV-11-0921 PHX-GMS

**PLAINTIFFS' OPPOSITION TO
DEFENDANT ARPAIO'S MOTION TO
DISMISS**

I. INTRODUCTION

Defendant Arpaio has moved to dismiss this action because he has not yet arrested or threatened to arrest any of the Plaintiffs under the authority of SB 1363. The problem with this ripeness argument is that SB 1363 is already having real, concrete effects on

1 Plaintiffs' conduct, as the Legislature plainly intended it to have, changing how Plaintiffs
2 operate their unions to avoid violating their new statutory obligations, as is specifically
3 alleged in the FAC. Plaintiffs' fears of arrest are not idle. They allege (and can prove at
4 the appropriate time) that they are actively engaged in group speech at or near workplaces
5 in Maricopa County and in speech critical of employers in the County which draws
6 claims of falsity by such employers.

7 SB 1363 creates criminal liability for defamation of employers and for unlawful
8 mass assembly (defined to include assembly in an "unreasonable" manner). Further, it
9 defines these offenses as forms of "workplace harassment" for which injunctions can
10 issue without notice and upon a far lower than normal evidentiary burden; SB 1363 then
11 enlists law enforcement officers such as Defendant Arpaio as the agent for enforcing such
12 injunctions. "Defamation" is broadly defined by the statute to encompass negligent
13 falsity (even though the U.S. Supreme Court has repeatedly held that the standard in labor
14 disputes is the more rigorous standard of knowing or intentional falsity). This all places
15 Plaintiffs at substantially-heightened risk of arrest and prosecution—and as a result has
16 chilled Plaintiffs from engaging in the types of conduct they historically engaged in
17 without fear of legal consequences.

18 A suit over violations of free speech rights is ripe for judicial review when the
19 plaintiff reasonably censors himself rather than face arrest and prosecution. Because
20 Plaintiffs' FAC alleges that the threat of prosecution by Defendant Sheriff "is deterring
21 Plaintiffs . . . from engaging in a significant amount of [union] activities," FAC ¶ 112,
22 there is no merit to Defendant's motions under Rule 12(b)(1) and (6).

23 If somehow there were insufficient detail in the FAC, Plaintiffs are entitled to
24 leave to amend. The regularity of their speech and assembly conduct which would subject
25 them to arrest can be spelled out in greater detail, as can the Sheriff's past history on
26 these issues, as well as his duty to enforce the Legislature's dictates even if he were to
27 harbor doubts of their constitutionality.

II. STATEMENT OF FACTS

The Plaintiffs are United Food & Commercial Workers Local 99, UA Plumbers and Steamfitters Local 469, and the top officer and an active member in each. Local 99 has 18,000 members and organizes in several different industries, having members not only in the food industry, but also museum technicians, legal aid attorneys, parking lot cashiers, and janitors. See www.ufcw99.org.

Included among Defendants is Sheriff Joe Arpaio who is Maricopa County Sheriff. The FAC states that “[a]bsent contrary order of this Court, the Sheriff and his deputies are likely to take action against Plaintiff Unions as directed by provisions of SB 1363.” FAC ¶ 11. Maricopa County is the most populous county in Arizona, and Plaintiff Unions have been and will continue to be active in that area.

Plaintiffs allege a well-grounded fear of prosecution under SB 1363 because they “have regularly engaged in union activities on sidewalks and parking lots in front of their employer’s facilities.” FAC ¶ 111. Plaintiffs also fear future prosecution because they “have regularly engaged in speech critical of employers and been accused of defamation. . . .” FAC ¶ 117.

Plaintiffs are already suffering injury resulting from passage of SB 1363 because fear of prosecution under the Act is having a “deterrent effect” on continued criticism of employers and participation in union activities. FAC ¶ 78, 97. Plaintiffs “suffer inherently-irreparable injuries to their speech and assembly rights, to union members’ receipt of representation [,] and to union officials’ functioning as labor representatives.” FAC ¶ 10.

III. ARGUMENT

A. PLAINTIFFS HAVE ALLEGED FACTS THAT ESTABLISH A JUSTICIABLE CASE OR CONTROVERSY

Defendant Sheriff’s motion under Rule 12(b)(1) and (6) ignores factual statements in Plaintiffs’ well-pleaded complaint that allege already-existing injuries that Plaintiffs have suffered due to the well-founded threat of future prosecution under SB 1363 by

Defendant. In determining whether a plaintiff has stated a cause of action that survives pleading standards under Rule 8 of the Federal Rules of Civil Procedure, the Supreme Court has outlined a two-step process. First, the Court requires a determination of whether a complaint includes “well-pleaded factual allegations.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009). If a court finds the complaint to include such well-pleaded facts, “a court should assume their veracity.” *Id.* Second, a court should determine whether those facts “plausibly give rise to an entitlement to relief.” *Id.* Determining plausibility under the second prong is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* Additionally, courts have stated that in the context of challenging the legality of a state’s newly enacted law, plaintiffs can satisfy the case or controversy requirement before the law in question is actually enforced against them. Courts have said that the case or controversy requirement is satisfied “[w]hen a party is faced with the choice between the disadvantages of complying with [a newly enacted law] or risking the harms that come with noncompliance.” *Metropolitan Milwaukee Ass’n of Commerce v. Milwaukee County*, 325 F.3d 879, 883 (7th Cir. 2003) (holding that a business association satisfied the “case or controversy” requirement when challenging a local ordinance on preemption grounds before its enactment because the fact that the ordinance required that certain contractors doing business with the county negotiate “labor peace agreements” with unions caused Plaintiffs to be in a worse position than they were before enactment of the ordinance.)

Plaintiffs’ factual allegations easily survive Rule 8. Plaintiffs’ FAC alleges that Defendant Sheriff Joe Arpaio “is the Sheriff of the County of Maricopa . . . [and] [a]bsent contrary order of this Court, the Sheriff and his deputies are likely to take action against Plaintiff Unions as directed by provisions of SB 1363.” FAC ¶ 11. Furthermore, Plaintiffs list six specific ways in which provisions of SB1363 violate their constitutional rights.¹

¹ “[F]irst, [SB 1363] expand[s] employer remedies for union violations of an anti-picketing statute already struck down as unconstitutional by the Arizona Supreme Court.... Second, SB 1363 criminalizes any assemblies by labor [performed] in an “unreasonable” manner, without defining this term This is absurdly vague and

1 FAC ¶ 2. Plaintiffs also state that they are actively suffering actual injury because fear of
2 prosecution under SB 1363 is deterring continued criticism of employers and
3 participation in union activities. FAC ¶¶ 78, 97.

4 For purposes of Defendant's Motion to Dismiss, this Court must assume the facts
5 alleged in the FAC to be true. When taken as true, these facts describe with specificity
6 Plaintiffs' grounds for challenging SB 1363's constitutionality and the injuries Plaintiffs
7 are actively suffering to their union activities and free speech as a result of their
8 reasonable belief they will be arrested by Defendant Sheriff. Indeed, Plaintiffs are "faced
9 with the choice [of accepting] the disadvantages of complying with [a newly enacted law]
10 or risking the harms that come with noncompliance." *Metropolitan Milwaukee Ass'n of*
11 *Commerce*, 325 F.3d at 883. Furthermore, by granting relief and enjoining the Defendant,
12 the Court would redress the Plaintiffs' injury because enjoining Defendant Sheriff from
13 enforcing SB 1363 would allow Plaintiffs to freely continue engaging in their traditional
14 union activities in Maricopa County without the fear of future prosecution under SB
15 1363.

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19 overbroad in violation of the First and Fourteenth Amendments Third, the bill
20 contains additional punishments for secondary boycotts which the U.S. Supreme Court
21 has already held that state laws cannot seek to provide. . . . Fourth, SB 1363 allows
22 defamation suits to be brought against unions for mere negligence in their speech,
23 whereas the U.S. Supreme Court has already declared that in labor disputes the standard
24 is the higher one of intentional falsity or recklessness. Fifth, SB 1363 punishes any
25 employer who lives up to its union contract obligation to deduct dues as previously
26 requested by an employee This provision violates constitutional prohibitions against
27 impairment of contractual obligations and is preempted by federal labor laws. Sixth, SB
28 1363 prohibits law enforcement officials from asking an employer who wants unionists
removed for any proof of the employer's right to make such request, merely because the
employer without giving notice to the Union persuaded the Secretary of State to place
this employer on a "No Trespass" list published by the Secretary, a form of notice not
compliant with due process FAC ¶ 2.

B. PLAINTIFFS HAVE STANDING TO RAISE THEIR CLAIMS

In addition to satisfying pleading standards under Rule 8, Plaintiffs satisfy standing requirements to challenge SB 1363. In order to have standing, Plaintiffs must show that they have suffered an “injury in fact . . . [that can] fairly . . . be traced to the challenged action of the defendant [, and a] likelihood that the injury will be redressed by a favorable decision. . . .” *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663 (1993) (omitting internal citations, quotation marks, and footnotes). However, in the free speech context, when a challenged statute risks chilling the exercise of First Amendment rights of a Plaintiff, “the Supreme Court has dispensed with rigid standing requirements,” *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003), and has recognized self-censorship as “a harm that can be realized even without an actual prosecution.” *Id.* at 1095 (omitting internal quotations and citations). This is especially true when a law is targeted directly at Plaintiffs, as is the case here. See, e.g., *Virginia v. American Booksellers Association*, 484 U.S. 383, 393 (1988) (holding that book stores have standing to facially challenge an ordinance before it is enforced against them because it “is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution.” *Id.* at 392.)

Plaintiffs allege that they are actively suffering an injury in fact because fear of prosecution under SB 1363 by Defendants “is deterring Plaintiffs . . . from engaging in a significant amount of [union] activities” (e.g., picketing employers, leafleting in front of employers). FAC ¶ 112. Thus, the FAC alleges that the threat of prosecution by Sheriff Arpaio, one of those Defendants, has already caused Plaintiffs to engage in self-censorship by refraining from participating in expressive activity. This self-censorship is a “constitutionally sufficient injury,” *Cal. Pro-Life Council*, 328 F.3d at 1107, because it is based on “an actual and well-founded fear that the challenged statute will be enforced.” *Id.* at 1095 (internal quotation marks and citations omitted).

1 Plaintiffs' fear of prosecution by Defendant Sheriff is especially well-founded
 2 because Plaintiff Unions have been and will continue to be active in Maricopa County.
 3 Moreover, the risk of prosecution is great because so many of the provisions of SB 1363
 4 are ambiguous, vague, and overbroad. This law, for example, "criminalizes any
 5 assemblies by labor [performed] in an 'unreasonable' manner, without defining this term
 6 in any way other than saying it should not be construed to violate federally-protected
 7 rights." FAC ¶ 2, citing ARS 23-1327(A)(5) and (B). Plaintiffs "have no way of knowing
 8 what a judge would consider 'unreasonable' in assembling [,]" FAC ¶ 87, and they
 9 therefore reasonably fear future prosecution under SB 1363 on the basis that they have
 10 and will engage in activity that "some but not all people would find unreasonable . . ."
 11 FAC ¶ 85.²

12 Furthermore, the broad injunctive relief provisions of SB 1363 make it particularly
 13 likely that Defendant Sheriff will be obligated to enforce this law against Plaintiffs, no
 14 matter what his present intent might be. When an employer successfully obtains an
 15 injunction in Maricopa County under the additional authority granted to state courts in
 16 SB 1363³, that order must state, "If you disobey this order, you may be arrested and

17 ² Additionally, every time unions like Plaintiffs encourages a consumer boycott of an
 18 employer or lobbies against its relicensing (common conduct that is wholly protected by
 19 the NLRA and First Amendment under *NAACP v. Claiborne Hardware*, 458 U.S. 886
 20 (1982)), this is arguably destruction of the "intangible property" of the employer
 (consumer goodwill) and hence a violation of the new ARS 12-1321(1)

21 ³ Section 2 of SB 1363 (codified at ARS 12-1810) in paragraph E expressly dispenses
 22 with the normal requirements for preliminary injunctive relief in ARCP Rule 65(a) that
 23 "[n]o preliminary injunction shall be issued without notice to the adverse party" and then
 24 instead provides lower standards: "If the court finds reasonable evidence of harassment of
 25 the plaintiff by the defendant during the year preceding the filing of the petition or that
 26 good cause exists to believe that great or irreparable harm would result to the plaintiff if
 27 the injunction is not granted before the defendant or the defendant's attorney can be heard
 28 in opposition and the court finds specific facts attesting to the plaintiff's efforts to give
 notice to the defendant or reasons supporting the plaintiff's claim that notice should not
 be given." ARS 12-1810(E) also dispenses with the requirement of ARCP Rule 65(e) that
 a bond be posted, thereby further encouraging pursuing of injunctions without solid
 grounds.

1 prosecuted for the crime of interfering with judicial proceedings and any other crime you
 2 may have committed in disobeying this order.” 12-1810(H). Every such injunction must
 3 be registered with the county sheriff’s office. 12-180(J). Then, any peace officer may
 4 arrest a person for violating such injunction based on probable cause “[w]hether or not a
 5 violation occurs in the presence of a peace officer, with or without a warrant,” 12-1810
 6 (M), and peace officers are immunized from liability for such arrests. 12-1810(P). Once
 7 such an injunction is granted in Maricopa County, Defendant Sheriff will have no choice
 8 but to enforce it.

9 Moreover, the new statute prohibits the Sheriff’s deputies from making any further
 10 inquiry into the bona fides of an employer request for a trespass arrest if the employer
 11 listed some property with the Secretary of State (ARS 23-1326(F)) (“the responding
 12 peace officer may not require the employer to provide any further documentation to
 13 establish the employer’s property rights before requiring any labor organization or
 14 individual or groups of individual . . . to leave the employer’s property”). Thus,
 15 Defendant Sheriff is likely to arrest Plaintiffs under such circumstances because the
 16 Plaintiffs’ union activities are often performed on some employer’s property. Plaintiffs
 17 engage in these union activities on employers’ properties because courts and the NLRB
 18 have held that under the NLRA, employees have a right to be present off-duty on an
 19 employer’s property to engage in union activities⁴ and non-employee union agents have
 20 the right to access an employer’s property when an employer lets other outsiders use the
 21 property for speech⁵ or when the employer is not the actual property owner but merely a

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 23 ⁴ *Tri-County Medical Center*, 222 NLRB 1089 (1976); *First Healthcare Corp. v. N.L.R.B.*, 344 F.3d 523 (6th Cir. 2003).

24 ⁵ *Lucile Salter Packard Children's Hosp. v. NLRB*, 97 F. 3d 583, 587 (D.C. Cir. 1996)(“First, under the ‘inaccessibility’ exception, an employer violates section 8(a)(1) if
 25 it denies a union access to the employer's property where the union has no other
 26 reasonable means of communicating its message to employees. [cites] Second, under the
 27 ‘non-discrimination’ exception, an employer engages in discrimination as defined by
 28 section 8(a)(1) if it denies union access to its premises while allowing similar distribution
 or solicitation by nonemployee entities other than the union. [cites]”).

1 lessee sharing common areas.⁶ Furthermore, most union contracts provide for union
 2 representatives to have access to premises, and the NLRA gives union representatives the
 3 right to observe working conditions inside facilities where they are the designated
 4 representative.⁷ But under SB 1363, the Sheriff has been ordered to ignore those usual
 5 reasons for union activities to be taking place on employer property, and must instead
 6 arrest the union members if the employer so requests.

7 Fear of prosecution under the unconstitutional provisions of SB 1363 is also well-
 8 founded because Defendant Sheriff has not stated that he will not enforce the Act. Indeed,
 9 he has no authority to declare a statute unconstitutional and decline to enforce it. Nor has
 10 he indicated that he would abide by a ruling of unconstitutionality reached against the
 11 state defendants only (and of course, they want to be dismissed on the grounds that much
 12 enforcement was left up to local law enforcement not them).

13 Finally, there is the Sheriff Department's own track record which adds to the
 14 reasonableness of Plaintiffs' fears here. See, e.g., *Lacey v. Maricopa County*, --- F.3d ----
 15 , 2011 WL 2276198 (9th Cir. June 9, 2011) (reciting allegations supporting claim that
 16 publisher arrested for speech activities); *Ortega Melendres v. Arpaio*, 598 F. Supp. 2d
 17 1025 (D. Ariz. 2009)(alleged sweeps targeted at Hispanic community, which is where
 18 current organizing by Plaintiff UFCW occurring); *Demery v. Arpaio*, 378 F.3d 1020 (9th
 19 Cir. 2004), cert. denied, 545 U.S. 1139 (2005) (holding that district court did not abuse its
 20 discretion by granting Plaintiff injunction because Plaintiff was likely to succeed on due
 21 process claim against Defendant Arpaio for using world-wide-web cameras to stream live
 22 images of pretrial detainees on the Internet prior to adjudication of guilt); *Owen v.*

23 ⁶ *Wild Oats Markets*, 336 NLRB 179 (2001)(employer violates Act by calling police to
 24 remove union agents from parking lots it did not own but merely leased and shared with
 25 others); *O'Neil's Markets, Inc. d/b/a Food For Less*, 318 NLRB 646 (1995); *Victory*
 26 *Markets*, 322 NLRB 17 (1996); *A&E Food Co. 1, Inc.*, 339 NLRB 806 (2003); *UFCW,*
Local 400 v. NLRB (Farm Fresh), 222 F.3d 1030 (D.C. Cir. 2000).

27 ⁷ *NLRB v. Unbelievable, Inc. d/b/a Frontier Hotel*, 71 F.3d 1434, 1438-1439 (9th Cir.
 28 1995); *NLRB v. C.E. Wylie Construction Co.*, 934 F.2d 234, 238-239 (9th Cir. 1991);
NLRB v. Villa Avila, 673 F.2d 281, 283-284 (9th Cir. 1982).

1 *Maricopa County*, 2009 WL 1929346 (D. Ariz. Case No. 2:07-CV-01463) (jury awarded
 2 \$125,000 to Plaintiff after Deputy Sheriff falsely arrested her for failure to obey a police
 3 officer and resisting arrest in response to her complaints about his failure to police
 4 traffic). Plaintiffs' complaint is not contending the Sheriff or his deputies are ill-
 5 motivated, but merely noticing that they have been handed tasks by the Legislature which
 6 leave them little or no choice but to arrest Plaintiffs for commonplace union activities,
 7 including activities such as "unreasonable" assembly, whose boundaries are nearly
 8 impossible to predict.⁸

9 C. PLAINTIFFS' CLAIMS ARE RIPE FOR ADJUDICATION

10 To assess ripeness, courts must evaluate "both the fitness of the issues for judicial
 11 decision and the hardship to the parties of withholding court consideration." *Abbott*
 12 *Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

13 ⁸ Plaintiffs also reasonably believe Defendant Sheriff will enforce SB 1363 because the
 14 courts have established the general principle that officers like the Sheriff have a general
 15 duty to enforce laws passed by the legislature, even if they think the law they are
 16 enforcing is unconstitutional. Declining to do so, these courts state, is an infringement
 17 upon the principle of separation of powers. See, e.g., *Lear Siegler, Inc., v. Lehman*, 842
 18 F.2d 1102, 1125 (9th Cir. 1988), reh'g granted, 863 F.2d 693 (9th Cir. 1988), withdrawn
 19 in part on other grounds, 893 F.2d 205 (9th Cir. 1989) ("We also note that in declaring
 20 the CICA stay provisions unconstitutional and suspending their operation, the executive
 21 branch has assumed a role reserved for the judicial branch***The executive branch's
 22 attempt to arrogate to itself the power of judicial review is a paradigmatic violation of our
 23 system of separation of powers and checks and balances. As this court has stated, [i]f the
 24 essential, constitutional role of the judiciary is to be maintained, there must be both the
 25 appearance and the reality of control by Article III judges over the interpretation,
 26 declaration and application of federal law."(internal citations and quotation marks
 27 omitted); *Lockyer v. San Francisco*, 33 Cal.4th 1055 (2000) ("We conclude that a local
 28 public official, charged with the ministerial duty of enforcing a statute, generally does not
 have the authority, in the absence of a judicial determination of unconstitutionality, to
 refuse to enforce the statute on the basis of the official's view that it is unconstitutional."
Id. at 1082. "It is worth noting that the California rule generally precluding an executive
 official from refusing to perform a ministerial duty imposed by statute on the basis of the
 official's determination or opinion that the statute is unconstitutional is consistent with
 the general rule applied in the overwhelming majority of cases from other jurisdictions."
Id. at 1105.)

1 While Defendant Sheriff has not yet arrested Plaintiffs under SB 1363, which only
2 went into effect this month, Plaintiffs' claims are still sufficiently ripe for adjudication
3 because "a plaintiff need not first expose himself to actual arrest or prosecution to be
4 entitled to challenge [the] statute." *Babbitt v. United Farmer Workers National Union*,
5 442 U.S. 289, 302 (1979) (internal quotation marks and citation omitted) (holding that a
6 Union has standing to sue the State of Arizona to challenge a newly enacted state law
7 because "fear of criminal prosecution under an allegedly unconstitutional statute is not
8 imaginary or wholly speculative" when a Union has "actively engaged in consumer
9 publicity campaigns [that may now be prohibited by the statute] in the past and has
10 alleged their intention to continue to engage in boycott activities.").

11 The issues are fit for judicial review because the challenges posed to SB 1363 by
12 Plaintiffs are facial, purely legal, and would not significantly benefit from further factual
13 development.⁹ Indeed, a finding of preemption and unconstitutionality is likely because
14 some parts of SB 1363 are clearly in conflict with past court precedent. For example, the
15 provision defining defamation of employers to include negligent rather than intentional or
16 reckless misstatements is openly defies *Linn v. Plant Guard Workers*, 383 US 53, 64-65
17 (1966) ("We therefore limit the availability of state remedies for libel to those instances in
18 which the complainant can show that the defamatory statements were circulated with
19 malice and caused him damage.* * * Construing the Act to permit recovery of damages

21 ⁹ Even if further factual development would be of some benefit to the court, that fact
22 alone should not lead the court to find this action unripe. See *Metropolitan Milwaukee*
23 *Ass'n of Commerce v. Milwaukee County*, 325 F.3d 879, 882 (holding that employer
24 association's action against a county for passing a local ordinance that was allegedly
25 preempted by the National Labor Relations Act and violated the First Amendment was
26 ripe for adjudication before actual enforcement because, although it would be useful to
27 have the benefit of the County's interpretation of the terms or reach of a local ordinance,
28 the absence of this information does not preclude judicial review since the complaint
raised "almost purely legal issues" that are "quintessentially fit . . . for present judicial
resolution.")

1 in a state cause of action only for defamatory statements published with knowledge of
2 their falsity or with reckless disregard of whether they were true or false guards against
3 abuse of libel actions and unwarranted intrusion upon free discussion envisioned by the
4 Act.”). Another example is that SB 1363 “expand[s] employer remedies for union
5 violations of an anti-picketing statute already struck down as unconstitutional by the
6 Arizona Supreme Court.” FAC ¶ 2. See *Baldwin v. Arizona Flame Restaurant, Inc.*, 82
7 Ariz. 385, 313 P.2d 759 (Ariz. 1957) (“The plain wording of section 56-1310 [also in
8 ARS 23-1322] . . . effectively provides that under all circumstances, regardless of
9 purpose, a union having less than a majority is prohibited from all peaceful picketing.
10 Such clearly on its face constitutes a general prohibition against peaceful picketing in
11 violation of the United States Constitution”) SB 1363 also “contains additional
12 punishments for secondary boycotts which the U.S. Supreme Court has already held that
13 state laws cannot seek to provide. . . .” FAC ¶ 2 (citing *Teamsters v. Morton*, 377 U.S.
14 252 (1964)(“state law has been displaced by [LMRA] section 303 in private damage
15 actions based on peaceful union secondary activities.”). See also *Smart v. Local 702 Int'l*
16 *Bhd. of Elec. Workers*, 562 F.3d 798, 808 (7th Cir. 2009) (Section 303 of the Labor
17 Management Relations Act, 29 USC 187, “completely preempts state-law claims related
18 to secondary boycott activities described in section 158(b)(4); it provides an exclusive
19 federal cause of action for the redress of such illegal activity.”).

20 The preenforcement nature of this does not preclude judiciary review because
21 Defendant Sheriff “has not suggested that the newly enacted law will not be enforced,
22 and [the court should] see no reason to assume otherwise.” *Virginia v. American*
23 *Booksellers Association*, 484 U.S. 383, 393 (1988).

24 Plaintiffs’ claims also satisfy ripeness requirements because the pendency of SB
25 1363 has already caused Plaintiffs hardship and will continue to cause such hardship so
26 long as the Act is not enjoined against Defendant Sheriff. As alleged in Plaintiffs’ FAC,
27 enactment of SB 1363 is already “curtailing such activities” as picketing, boycotting, and
28 organizing in Maricopa County. FAC ¶ 86. This impact has reduced effectiveness of the

1 Plaintiffs to act as an effective labor representative. As long as SB 1363 is not enjoined
2 and the well-founded threat of arrest by Defendant Sheriff exists, Plaintiffs' effectiveness
3 at representing their member's interests in the largest county in the State will be
4 continually impaired.

5 Delayed adjudication of the issues in this action will cause additional hardship to
6 Plaintiff Unions because delaying a decision regarding the legality of SB 1363 will
7 continually injure Plaintiffs' ability to engage in publicity, including picketing against
8 employers without employee consent, by placing Plaintiffs in "the dilemma of incurring
9 the disadvantages of complying [with SB 1363] or risking penalties for noncompliance."
10 *Whitney v. Heckler*, 780 F.2d 963, 968-69 n. 6, (11th Cir. 1986) ("It is well established
11 that [a case with this type of dilemma] is ripe for judicial review . . ."), *cert. denied*, 479
12 U.S. 813.

13 Moreover, prolonged uncertainty about the validity and scope of SB 1363 will
14 concretely harm Plaintiffs because threat of enforcement of the Act substantially affects
15 Plaintiffs' bargaining power with employers by impairing the availability of important
16 economic weapons that Congress provided to labor unions. By substantially affecting
17 Plaintiffs' ability to employ publicity and picketing against employers, SB 1363
18 "permanently and substantially shifts the terms of bargaining . . . even in situations where
19 the possibility of [picketing] appears remote." *Employers Association v. United*
20 *Steelworkers*, 32 F.3d 1297, 1299-1300 (8th Cir. 1994) (holding that an association of
21 employers action against the state for passing a statute that made it an unfair labor
22 practice to hire permanent replacements for striking workers was ripe even though unions
23 had not yet called a strike against any member employer.); see also *Chamber of*
24 *Commerce v. Reich*, 57 F.3d 1099, 1100 (D.C. Cir.1995) (holding that a challenge to an
25 Executive Order allowing disqualification of any federal contractor that permanently
26 replaced striking workers was ripe because the mere existence of the order "alters the
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1 balance of bargaining power between employers and employees by . . . depriving them of
2 a significant economic weapon in the collective bargaining process.”).¹⁰

3 Delayed consideration of Plaintiffs’ claims is also likely to cause hardship because
4 once a “harassment” injunction issues under SB 1363, Plaintiffs cannot violate it and then
5 defend themselves against contempt on the grounds that the law permitting said
6 injunction was unconstitutional. *State v. Chavez*, 123 Ariz. 538, 601 P.2d 301 (Ariz. App.
7 1979) (in labor injunction case, holding that a Union cannot rely on the
8 unconstitutionality of an injunction to defend against contempt charges arising from
9 violation of that injunction.). Thus, because SB 1363 lowers the bar for ex parte
10 injunctions against unions like Plaintiffs, an employer in Maricopa County may be able to
11 successfully enjoin Plaintiffs from engaging in speech on or near their properties that
12 previously had been fully protected by the First Amendment and federal labor law. If
13 Plaintiffs then violate this ex parte injunction, they could be convicted of a crime even
14 though the statute authorizing this conviction is unconstitutional and even though
15 Plaintiffs were not given an opportunity to defend against the injunction in court. Also, if
16 this Court withholds consideration of these statutes’ constitutionality until prosecutions of
17 Plaintiffs occurs, such delay would likely cause the unique federal issues in Plaintiffs’
18 FAC to instead be presented to Arizona criminal courts for resolution. Plaintiffs are likely
19

20 ¹⁰ Section 3 of SB 1363 further alters the balance of power by encouraging employers to
21 campaign for employees to stop paying dues even before contractually eligible to do so,
22 as occurred during the last round of grocery negotiations (as recounted in the FAC). For
23 those employees who then quit or are terminated, employers can justly point to the
24 possibility of criminal prosecution by the Sheriff for not turning those wages over to the
25 employees instead under a companion provision of the ARS, ARS 23-353: “A. When an
26 employee is discharged from the service of an employer, he shall be paid wages due him
27 within three working days or the end of the next regular pay period, whichever is sooner.
28 B. When an employee quits the service of an employer he shall be paid in the usual
manner all wages due him no later than the regular payday for the pay period during
which the termination occurred. If requested by the employee, such wages shall be paid
by mail.* * * D. A person violating this section is guilty of a petty offense.”

1 to suffer hardship as a result of this delay because Arizona criminal courts lack this
2 Court's level of expertise on preemption and First Amendment issues.

3 Thus, Plaintiffs' case is ripe because awaiting further factual development is
4 unnecessary to address the constitutional claims and would subject Plaintiffs to
5 unnecessary and expensive criminal court proceedings. This Court could eliminate
6 current hardships for Plaintiffs and prevent further ones and avoid unnecessary
7 duplicative proceedings by enjoining enforcement of key provisions of SB 1363 on the
8 basis of Plaintiffs' facial and purely legal constitutional arguments.

9
10 **D. IF THE COURT HAS ANY DOUBTS AS TO STANDING OR
11 RIPENESS, IT STILL MUST GRANT LEAVE TO AMEND**

12 If necessary, Plaintiffs could amend the Complaint to include additional
13 allegations that (1) food stores and other work locations where Plaintiffs have members
14 or are organizing are located in unincorporated sections of Maricopa County; (2)
15 Defendant Sheriff's deputies have appeared at most of the picket lines formed in these
16 unincorporated sections of the County, and that a majority of times that picket lines have
17 been visited by Defendant Sheriff's deputies, the deputies issue instructions limiting
18 Plaintiffs' picket conduct. Plaintiffs could also provide additional detail explaining that
19 their bargaining power heavily depends on their organizations' ability to engage in
20 speech in the forms restricted by SB 1363, and as to retail employers in particular, the
21 employees' withholding of their labor is not as important to their success as the
22 customers' support for the employees' cause obtained via on-site publicity.

23 While Plaintiffs already allege they re modifying their speech because they fear
24 prosecution under SB 1363 under the newly lowered standards for employer defamation
25 because they "have regularly engaged in speech critical of employers and been accused
26 of defamation," FAC ¶ 117, Plaintiffs could amend the Complaint to include citations to
27 cases in which Plaintiffs have been sued by employers for defamation. Plaintiffs could
28 also amend to list numerous examples of Arizona employers who have disputed union

1 allegations against them which could now lead to arrest for defaming an employer (or for
2 violating an injunction against defamation) under the new lenient standard of SB 1363.

3 Plaintiffs could also allege more specific examples of Defendant Sheriff's past
4 conduct with respect to labor unions and speech rights which underscore the
5 reasonableness of Plaintiffs' fear of future prosecution under SB 1363. For example, on
6 February 23, 2010 at approximately 10:30 AM on 9949 W. Alabama Avenue in Sun City,
7 an unincorporated part of Maricopa County, Sheet Metal Workers International
8 Association supporters began picketing and chanting but were interrupted by Defendant
9 Sheriff's deputies, who warned them that all chanting had to cease because it allegedly
10 violated the state's disorderly conduct statute. SWMIA members were specifically
11 threatened with arrest if they failed to comply. Plaintiffs tried to appeal to officers by
12 bringing to their attention that people using leaf blowers in that area were equally loud or
13 louder yet were still not threatened with prosecution, but the officers were unresponsive
14 to this argument.

15 Plaintiffs could also allege that UFCW in the month of June, 2011, has handbilled
16 or joined workers' delegations in at least a half-dozen properties within Maricopa
17 County. These organizing campaigns are still ongoing, have resulted in threats to call law
18 enforcement and disagreements about credibility of union statements. Plaintiffs thus
19 would provide further concrete factual support for reasonably believing that participants
20 in at least one of these campaigns will end up arrested by Defendant Sheriff under SB
21 1363 if Plaintiffs do not keep on censoring themselves.

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The Sheriff's motion to dismiss this civil rights suit must be denied because sheriffs have already suffered injuries in Maricopa County such as curtailing their duties and loss of bargaining power due to well-founded fear of prosecution by the state under SB 1363.

Respectfully submitted,

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By: /s/ Gerald Barrett

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2011, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

/s/ Joyce Archain